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CAROLE KNEELAND, BELO BROADCASTING CORP., A.H. BELO CORP. d/b/a THE DALLAS MORNING NEWS, THE TIMES HERALD PRINTING CO. and DAVID EDEN,
Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION and SOUTHWEST ATHLETIC CONFERENCE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF AMICUS CURIAE FOR THE STATE OF TEXAS IN SUPPORT OF PETITIONERS

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15 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. Absent contrary state law, the Fifth Circuit must follow applicable Attorney General open records decisions 4

II. The Fifth Circuit failed to follow applicable Attorney General decisions interpreting the Texas Open Records Act 6

III. Applicable Attorney General open records decisions require application of the language of the Texas Open Records Act, not just the language of one open records decision 8

CONCLUSION 9

TABLE OF AUTHORITIES

Cases **Pages**

A. H. Belo Corp. v. Southern Methodist University, 734 S.W.2d 720 (Tex. App. - Dallas 1987, writ denied) 6,9

City of Houston v. Houston Chronicle Publishing Co., 673 S.W.2d 316 (Tex. App. - Houston [1st Dist.] 1984, no writ) 4

Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) 4

Kneeland v. NCAA, 856 F.2d 191 (5th Cir. 1988) 1,2,3,5,7

Kneeland v. NCAA, 650 F.Supp. 1047 (W.D. Tex. 1986) 1

Lehman Brothers v. Schein, 416 U.S. 386 (1984) 4

Thomas v. Groeble, 147 Tex. 70, 212 S.W.2d 625 (Tex. 1948) 5

Tompkins v. City of El Paso, 449 F.2d 842 (5th Cir. 1971) 4

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 4

Statutes

28 U.S.C. sec. 1652 3,4,5,9

Tex. Rev. Civ. Stat. Ann. art. 6252-17a 1,6

Tex. Rev. Civ. Stat. Ann. art. 6252-17a, sec. 2(1)(F) 6,9

Tex. Rev. Civ. Stat. Ann. art. 6252-17a, sec. 7 2

Tex. Rev. Civ. Stat. Ann. art. 6252-17a, sec. 8 2

TEX. ATT'Y GEN. OP. No. JM-821 (1987) 1,3,6,7,8

TEX. ATT'Y GEN. OP. No. JM-116 (1983) . . . . . .8(n.1)

TEX. ATT'Y GEN. ORD No. 343 (1982) . . . . . .1,3,7,8(n.1)

TEX. ATT'Y GEN. ORD No. 228 (1979) 6,7,8,9

Miscellaneous

Project, Government Information and the Rights of Citizens, 73 Mich. L. Rev. 871 (1975) 2

SUP. CT. R. 36.4 1

The Texas Open Records Act: A Section by Section Analysis, 14 Hous. L. Rev. 398 (1977) 2

INTEREST OF AMICUS CURIAE

The Attorney General of the *amicus curiae* State of Texas submits this brief, pursuant to Supreme Court Rule 36.4, to bring to the attention of the Court an issue of importance to the people of Texas. This case affects all members of the public in Texas, not just the immediate parties to the case.

The central issue in *Kneeland v. NCAA*, 850 F.2d 224 (5th Cir. 1988), the decision from which Petitioners seek a writ of certiorari, is one of state law. In *Kneeland v. NCAA*, 650 F. Supp. 1047, 1057-63 (W.D. Tex. 1986), the district court applied Texas Attorney General opinions and held that the Texas Open Records Act, TEX. REV. CIV. STAT. ANN. art. 6252-17a, applies to the National Collegiate Athletic Association (NCAA) and the Southwest Athletic Conference (SWC). In *Kneeland v. NCAA*, 850 F.2d 224, 226-28, the Fifth Circuit reversed the judgment of the district court. In reversing the district court, the Fifth Circuit relied on an open records decision that the Texas Attorney General had overruled. *Kneeland v. NCAA*, 850 F.2d 224, 229 (5th Cir. 1988) (citing TEX. ATT'Y GEN. ORD No. 343 (1982), overruled in TEX. ATT'Y GEN. OP. No. JM-821 (1987)). Further, the Fifth Circuit failed to acknowledge the impact of the most recent Attorney General's opinion on point, TEX. ATT'Y GEN. OP. No. JM-821 (1987).

Although the Texas Attorney General is not compelled to follow the Fifth Circuit's interpretation of Texas law, other cases involving the Texas Open Records Act may be removed to federal court, as was this case. Parties in federal courts in Texas should not be subject to an interpretation of state law that differs

from the interpretation applied by the Texas Attorney General and by Texas courts.

The Fifth Circuit's application and discussion of state law in *Kneeland v. NCAA* undermines the Attorney General's open records process. The Texas Open Records Act requires governmental bodies to request a decision from the Texas Attorney General. TEX. REV. CIV. STAT. ANN. art. 6252-17a, sec. 7(a). The Attorney General can enforce open records decisions by seeking a writ of mandamus. Art. 6252-17a, sec. 8.

Commentators recognize the advantages of Texas' procedural scheme. The Texas Legislature's delegation to the Attorney General of this quasi-judicial responsibility has been deemed "the most innovative feature" of the Act. *The Texas Open Records Act: A Section by Section Analysis,* 14 Hous. L. Rev. 398, 429 (1977). A comprehensive 1975 study of the forty state open records acts then in effect found that expense and delay incurred by citizens in seeking judicial review of a governmental body's decision to deny access to public records was one of the greatest weaknesses in many state open records acts. *Project, Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971, 1183 (1975) (Michigan Project). The Michigan Project observed that the Texas procedure for delegating to the Attorney General the initial authority to make a determination of the issue "alleviate[s] the cost problem most effectively." *Id.* A survey of the one hundred forty-eight open records decisions issued by the Texas Attorney General prior to January 1, 1977, found that governmental bodies refused to follow the Attorney General's ruling on only three occasions. *The Texas Open Records Act: A Section by Section Analysis*, 14 Hous. L. Rev. 398, at 430. Because most governmental bodies seek the Attorney General's open records

decisions and abide by them, the quasi-judicial procedure is effective. The federal courts' failure to follow the Attorney General's open records decisions would undermine the effectiveness of this system.

Only a definitive statement from this Court determining whether the Fifth Circuit applied Texas law, consistent with federal statutory directives, can remove the cloud of uncertainty that now shadows the overall effectiveness of the Texas Attorney General's open records decisions and the validity of several specific open records decisions.

SUMMARY OF ARGUMENT

The Court of Appeals in *Kneeland v. NCAA*, 850 F.2d 224 (5th Cir. 1988), failed to follow 28 U.S.C. sec. 1652, which requires federal courts to apply substantive state law to pendent state claims. Although the Court of Appeals acknowledged that, absent state court decisions, it must "examine" the opinions of the Texas Attorney General, *Kneeland v. NCAA*, 850 F.2d at 228, the Court of Appeals failed to give effect to those opinions. The Court of Appeals relied in part on TEX. ATT'Y GEN. ORD No. 343 (1982), a decision overruled in TEX. ATT'Y GEN. OP. No. JM-821 (1987). Further, the Court of Appeals failed to give effect to the holding in Opinion JM-821. In overruling ORD No. 343, Opinion JM-821 cautioned against a mechanical application of the language articulated in specific earlier open records decisions and indicated that the totality of circumstances and the language of the Open Records Act controls whether an entity constitutes a governmental body subject to the Open Records Act.

ARGUMENT

I. Absent Contrary State Law, the Fifth Circuit must follow applicable Attorney General Open Records Decisions.

The Court of Appeals failed to follow 28 U.S.C. sec. 1652, which provides:

> The Laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. sec. 1652.

Federal courts must apply substantive state law to pendent state claims. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Absent state court decisions, the federal courts must resolve the issue as the forum state's courts would. *Lehman Brothers v. Schein*, 416 U.S. 386, 390-91 (1984); *see Tompkins v. City of El Paso*, 449 F.2d 842, 844 (5th Cir. 1971). The federal courts must attempt to apply the law not as the federal court would apply it but as the state courts would apply it, using the sources the state courts would use. *See id.*

Although Attorney General opinions and open records decisions do not have precedential value in Texas courts, they are ordinarily accorded "great weight" by the courts. *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 322 (Tex. App. - Houston [1st Dist] 1984, no writ); *see, e.g., Industrial Foundation of the South v. Texas Industrial*

Accident Board, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). When the Attorney General is charged with the duty of interpreting a statute and persons rely on the Attorney General's opinion, a court will not ordinarily give the statute a different meaning unless the Attorney General's opinion is clearly wrong. *See Thomas v. Groebl*, 212 S.W.2d 625, 635 (Tex. 1948). This is similar to the deference accorded to the interpretation of statutes formulated by the administrative agencies responsible for enforcing the statutes.

Because the Texas courts accord Attorney General's opinions and open records decisions the presumption of validity, in predicting how the Texas courts would apply the Open Records Act to the NCAA and the SWC, the Court of Appeals must apply Attorney General's opinions and open records decisions. Absent contrary state court decisions, Attorney General's opinions and open records decisions constitute state law for purposes of 28 U.S.C. sec. 1652.

The Court of Appeals acknowledged that it must "examine" Attorney General opinions and open records decisions:

> The usual deference paid to formal opinions of state attorneys general is accentuated in this case because the Texas Legislature has formally invited its Attorney General to interpret the Act when asked to do so.... Finding no dispositive Texas jurisprudence on this issue, we closely examine the opinions of the Texas Attorney General.

Kneeland v. NCAA, 850 F.2d 224, 228 (5th Cir. 1988). Despite this statement, however, the Court of Appeals

failed to follow Attorney General opinions and open records decisions.

II. The Fifth Circuit failed to follow applicable Attorney General Decisions interpreting the Texas Open Records Act.

The Texas Open Records Act, TEX REV. CIV. STAT. ANN. art. 6252-17a, (Act), applies to an entity if the entity constitutes a "governmental body," which includes:

> the part, section, or portion of every organization, corporation, commission, committee, institution, or agency which is supported in whole or in part by public funds, or which expends public funds. Public funds as used herein shall mean funds of the state of Texas or any governmental subdivision thereof;

Art. 6252-17a, sec. 2(1)(F). The dispositive issue in determining whether specific entities fall within this section is whether they are supported in whole or in part by public funds or whether they expend public funds. *A.H. Belo Corporation v. Southern Methodist University*, 734 S.W.2d 720, 723 (Tex. App. - Dallas 1987, writ denied); TEX. ATT'Y GEN. OP. No. JM-821 (1987).

In TEX. ATT'Y GEN. OP. No. JM-821, the Attorney General surveyed prior opinions in depth to determine the reach of section 2(1)(F) and applied the section to a new fact situation not previously encountered. The seminal decision under section 2(1)(F), TEX. ATT'Y GEN. ORD No. 228 (1979), applied section 2(1)(F) to a specific, narrow situation where one

contract defined the relationship between a private non-profit corporation and the city of Fort Worth. Decision No. 228 determined that the Act applied to the corporation because its contract with the city did not impose "a specific and definite obligation on the commission to provide a measurable amount of service in exchange for a certain amount of money as would be expected in a typical arms-length contract for services between a vendor and purchaser." This measurable services "test" is one means of determining whether an entity is supported by public funds or whether it simply sells goods or services to a governmental entity. The "test" is not simply a question of law; it depends on the facts in specific cases and cannot be applied mechanically. The district court apparently applied this "test" to the facts presented to it.

In TEX. ATT'Y GEN. OP. No. JM-821 (1987), the Attorney General also examined TEX. ATT'Y GEN. ORD No. 343 (1982), which determined that a private, non-profit corporation under contract with a hospital district to provide emergency medical service is not a "governmental body" because the applicable contract provided that the corporation should receive "each month a sum equal to the differences between cash receipts and approved operating expenditures of the ambulance service." Opinion JM-821 held that, on reconsideration, Decision No. 343 had applied the "measurable amount of service. . .in exchange for a certain amount of money" "test" mechanically. Opinion JM-821 therefore overruled Decision No. 343. The Court of Appeals relied on Decision No. 343 in *Kneeland v. NCAA*, 850 F.2d 224, 229 (5th Cir. 1988) (citing TEX. ATT'Y GEN. ORD No. 343 (1982), overruled in TEX. ATT'Y GEN. OP. No. JM-821 (1987)).

The Court of Appeals applied to the NCAA and the SWC the language originally articulated in ORD No. 228, the "measurable services" language, to apply to a specific, narrow fact situation -- an arms-length vendor-vendee relationship evidenced by a contract. The facts surrounding the relationship between the NCAA and the SWC on the one hand and Texas public colleges and universities on the other hand differ significantly.[1] In applying language applicable only in a narrow vendor-vendee situation to the NCAA and the SWC, the Court of Appeals failed to give effect to Opinion JM-821 (1987).

III. Applicable Attorney General Open Records Decisions require application of the language of the Open Records Act, not just the language of one Open Records Decision.

Further, TEX. ATT'Y GEN. OP. No. JM-821 announced a new "test" by stating that the terms of a contract will not alone control. The totality of circumstances and the language of the Open Records Act itself necessarily control whether an entity is supported in whole or part by or expends public funds. The nature of the function performed by the entity and its relationship with a governmental body are also relevant to whether an entity is supported by or expends public funds. The "test" first announced in

[1]The Court of Appeals did not clearly distinguish the Attorney General's application, in TEX. ATT'Y GEN. OP. No. JM-116 (1983), of the "measurable services" language to the Gulf Star Athletic Conference. The facts in JM-116 are more like those surrounding the relationship between the NCAA and the SWC and public universities than the facts in either TEX. ATT'Y GEN. ORD No. 228 (1879) or TEX. ATT'Y GEN. ORD No. 343 (1982) (overruled in TEX. ATT'Y GEN. OP. No. JM-821 (1987)).

TEX. ATT'Y GEN. ORD No. 228 is but one means of determining whether an entity has an arms-length relationship with a governmental body or whether it is supported in part by or expends public funds. The language drawn from ORD No. 228 cannot override the language of the Open Records Act itself.

The Court of Appeals failed to give effect to the express language of the Texas Open Records Act that applies the Act to entities either that are supported in whole or in part by public funds *or* that *expend* public funds. TEX. REV. CIV. STAT. ANN. art. 6252-17a, sec. 2(1)(F); *see A.H. Belo Corp. v. Southern Methodist University*, 734 S.W. 2d 720, 723 (Tex. App. - Dallas 1987, writ denied). Although the Court of Appeals upheld the district court's finding that the NCAA and the SWC receive Texas public funds, *Kneeland v. NCAA*, 850 F.2d 224, 226-28 (5th Cir. 1988), the Court of Appeals failed to address whether the NCAA and the SWC expend these funds. The Fifth Circuit considered only the issue of support under section 2(1)(F).

CONCLUSION

A writ of certiorari should issue to review the judgment of the Court of Appeals for the Fifth Circuit to determine whether the Court of Appeals followed 28 U.S.C.sec. 1652 and applied state law to Petitioners' pendent claims.

Respectfully submitted,

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